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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 ANTONIO CHAVEZ-JUAREZ,

7 Petitioner,

8 v.

9 NEVADA, STATE OF, *et al.*,

10 Respondents.
11

Case No. 3:17-cv-00192-MMD-WGC

ORDER

12 **I. SUMMARY**

13 This is a habeas corpus proceeding under 28 U.S.C. § 2254 in which Respondents
14 have filed a motion to dismiss (“Motion”) (ECF No. 19) in response to Petitioner Antonio
15 Chavez-Juarez’s first amended petition (“Petition”) (ECF No. 15).¹ For reasons discussed
16 below, the Motion is granted.

17 **II. BACKGROUND AND PROCEDURAL HISTORY**

18 In December 2013, a jury found Chavez-Juarez guilty of sexual assault on a child
19 (count two), four counts of lewdness with a child under the age of 14 (counts three–six),
20 one count of unlawful use of a minor as the subject of a sexual portrayal in a performance
21 (count seven), and one count of possession of visual presentation depicting sexual
22 conduct of a person under 16 years of age (count eight) (ECF No. 21-21).² He was found
23 not guilty of one count of sexual assault on a child (count one). *Id.* The state district court
24 sentenced Chavez-Juarez to 35 years to life for count two, 10 years to life for count three
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26 _____
27 ¹The Court has reviewed Petitioner’s response (ECF No. 26) and Respondents’
reply (ECF No. 28).

28 ²Exhibits referenced in this order are exhibits to Respondents’ Motion and are found
at ECF Nos. 20–22.

1 consecutive to count two, 10 years to life on each count for counts four to seven all
2 concurrent with count three, and 16–72 months for count eight concurrent with count three.
3 (ECF No. 21-26 at 35–36.) Judgment of conviction was filed on February 25, 2014. (ECF
4 No. 28.)

5 The Nevada Supreme Court affirmed Chavez-Juarez’s convictions. (ECF No. 22-
6 11.) The Nevada Court of Appeals affirmed the denial of his state postconviction habeas
7 corpus petition. (ECF No. 22-34.)

8 Chavez-Juarez dispatched his federal habeas corpus petition for filing in March
9 2017. (ECF No. 6.) This Court granted his motion for appointment of counsel. (ECF No.
10 10.) He filed the Petition through counsel. (ECF No. 15.) Respondents now move to
11 dismiss one ground as unexhausted and two grounds as procedurally barred. (ECF No.
12 19.)

13 **III. DISCUSSION**

14 **a. Grounds One and Two and Procedural Default**

15 28 U.S.C. § 2254(d) provides that this Court may grant habeas relief if the relevant
16 state court decision was either: (1) contrary to clearly established federal law, as
17 determined by the Supreme Court; or (2) involved an unreasonable application of clearly
18 established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d).

19 Procedural default refers to the situation where a petitioner in fact presented a claim
20 to the state courts, but the state courts disposed of the claim on procedural grounds,
21 instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991). A federal
22 court will not review a claim for habeas corpus relief if the decision of the state court
23 regarding that claim rested on a state law ground that is independent of the federal
24 question and adequate to support the judgment. *Id.*

25 The *Coleman* Court explained the effect of a procedural default:

26 In all cases in which a state prisoner has defaulted his federal claims in state
27 court pursuant to an independent and adequate state procedural rule,
28 federal habeas review of the claims is barred unless the prisoner can
demonstrate cause for the default and actual prejudice as a result of the

1 alleged violation of federal law, or demonstrate that failure to consider the
2 claims will result in a fundamental miscarriage of justice.

3 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The
4 procedural default doctrine ensures that the state's interest in correcting its own mistakes
5 is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th
6 Cir. 2003).

7 To demonstrate cause for a procedural default, the petitioner must be able to “show
8 that some objective factor external to the defense impeded” his efforts to comply with the
9 state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the
10 external impediment must have prevented the petitioner from raising the claim. See
11 *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

12 In ground one, Chavez-Juarez asserts that the trial court's admission of his
13 inculpatory statements obtained during a custodial interrogation without *Miranda*
14 protections violated his Fifth, Sixth, and Fourteenth Amendment rights to be free from self-
15 incrimination. (ECF No. 15 at 13–15.) In ground two, Chavez-Juarez argues that the
16 state's witness advocate coached victim A.C. during her testimony, in violation of Chavez-
17 Juarez's Fifth and Fourteenth Amendment due process rights. (*Id.* at 15–16.) Chavez-
18 Juarez raised these claims for the first time in his state postconviction proceedings. (ECF
19 No. 33-32 at 4–9, ECF No. 32-34 at 1–2.) The Nevada Court of Appeals affirmed their
20 denial as procedurally barred because they could have been raised in his direct appeal.
21 (ECF No. 32-34 at 2–5); see also NRS 34.810(1)(b).

22 Petitioner bears the burden of proving good cause for his failure to present the claim
23 and actual prejudice. NRS 34.810(3). The Ninth Circuit Court of Appeals has held that, at
24 least in non-capital cases, application of the procedural bar at issue in this case—NRS
25 34.810—is an independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069,
26 1073–75 (9th Cir. 2003); see also *Bargas v. Burns*, 179 F.3d 1207, 1210–12 (9th Cir.
27 1999). Therefore, the Nevada Court of Appeal's determination that federal grounds one
28

1 and two were procedurally barred under NRS 34.810(1)(b) was an independent and
2 adequate ground to affirm the denial of the claims in the state petition.

3 Chavez-Juarez argues that he can show cause and prejudice to excuse the default.
4 (ECF No. 26 at 8–12.) Respondents are correct that Chavez-Juarez only addresses cause
5 and prejudice with respect to federal ground one.

6 Chavez-Juarez acknowledges that he cannot now assert ineffective assistance of
7 appellate counsel as the basis for cause for failure to raise the *Miranda* issue on direct
8 appeal because he did not raise this in the state courts as an independent claim. (ECF
9 No. 26 at 8); *Cockett v. Ray*, 333 F.3d 938, 943 (9th Cir. 2003) (citing *Murray*, 477 U.S. at
10 488–489). Instead, he argues that his appellate counsel’s actions in this case actually
11 amounted to abandonment. (ECF No. 26 at 8.)

12 Chavez-Juarez points to *Maples v. Thomas*, 565 U.S. 266 (2012) in which the
13 Supreme Court held that counsel’s conduct there constituted client abandonment. In
14 *Maples*, two attorneys from a large, New York law firm represented an Alabama prisoner
15 on death row. *Id.* at 274–280. When they moved on to other employment they failed to
16 move to withdraw as counsel, or to contact their client Maples in any way. *Id.* In the
17 meantime, unbeknown to Maples, his state postconviction petition was denied, and he
18 missed the deadline to appeal. *Id.* The Supreme Court concluded that the attorneys wholly
19 abandoned their client without notice and occasioned the default. *Id.* at 289. The Court
20 held that such abandonment constituted cause. *Id.* at 290. Chavez-Juarez also discusses
21 *Bradford v. Davis*, in which the Ninth Circuit Court of Appeals held that a petitioner
22 established cause where his counsel filed multiple requests for extension of time and
23 requests for preparation funds, but never filed a state habeas petition nor moved to
24 withdraw as counsel. (ECF No. 26 at 9); *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir.
25 2019).

26 Here, Chavez-Juarez’s trial counsel litigated a motion to suppress his statements
27 to police, and the state district court denied the motion. (ECF No. 20-40.) Chavez-Juarez
28 argues that his appellate counsel abandoned him when he failed to challenge the denial

1 of the motion to suppress on appeal. (ECF No. 26 at 9–12.) Respondents point out that
2 appellate counsel filed a 26-page brief that raised two claims—a *Batson* claim and a claim
3 that the district court relied on improper factors at sentencing. (ECF No. 19 at 2, ECF No.
4 22-7 at 20, 28.)

5 The Court notes that appellate counsel has no duty to raise every nonfrivolous issue
6 on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). This Court disagrees that counsel
7 declining to raise an issue here constitutes client abandonment. The situation is readily
8 distinguished from that in *Maples* and *Bradford*, where counsel utterly failed to act, failed
9 to contact the petitioner, and failed to move to withdraw so that the client would even have
10 notice of such failure to act on his behalf. Despite Chavez-Juarez’s attempt to re-
11 characterize his argument as one of attorney abandonment, his complaint is in fact that
12 his appellate counsel was ineffective for failing to raise the *Miranda* issue on appeal.
13 Chavez-Juarez has not presented such an ineffective assistance of counsel claim to the
14 state courts, and it cannot provide cause here.

15 Accordingly, Chavez-Juarez has failed to demonstrate good cause and actual
16 prejudice to excuse the procedural default of grounds one and two. Thus, these grounds
17 are dismissed as procedurally barred from federal habeas review.

18 **b. Ground Four and Exhaustion/Technical Exhaustion/Anticipatory**
19 **Default**

20 A federal court will not grant a state prisoner’s petition for habeas relief until the
21 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*,
22 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair
23 opportunity to act on each of his claims before he presents those claims in a federal
24 habeas petition. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v.*
25 *Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has
26 given the highest available state court the opportunity to consider the claim through direct
27 appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916
28 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

1 In ground four, Chavez-Juarez sets forth the underlying claim implicated with
2 respect to grounds one and two above—that appellate counsel rendered ineffective
3 assistance in violation of his Sixth Amendment rights when he failed to raise the *Miranda*
4 issue on direct appeal. (ECF No. 15 at 19–20.) As noted, Chavez-Juarez acknowledges
5 that ground four was not raised in his state postconviction proceedings and is, therefore,
6 unexhausted. (ECF No. 26 at 8.) He insists that this ground should, therefore, be viewed
7 as technically exhausted and that he can overcome the default due to ineffective
8 assistance of postconviction counsel. (*Id.* at 12–14.)

9 The Court in *Coleman* held that ineffective assistance of counsel in postconviction
10 proceedings does not establish cause for the procedural default of a claim. *Coleman*, 501
11 U.S. at 750. However, in *Martinez v. Ryan*, 566 U.S. 1 (2012) the Court subsequently held
12 that the failure of a court to appoint counsel, or the ineffective assistance of counsel in a
13 state postconviction proceeding, may establish cause to overcome a procedural default in
14 specific, narrowly-defined circumstances. The Court explained that *Martinez* established
15 a “narrow exception” to the *Coleman* rule:

16 Where, under state law, claims of ineffective assistance of trial counsel must
17 be raised in an initial-review collateral proceeding, a procedural default will
18 not bar a federal habeas court from hearing a substantial claim of ineffective
19 assistance at trial if, in the initial-review collateral proceeding, there was no
20 counsel or counsel in that proceeding was ineffective.

21 *Martinez*, 566 U.S. at 17.

22 In *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), the Ninth Circuit provided
23 guidelines for applying *Martinez*, summarizing the analysis as follows:

24 To demonstrate cause and prejudice sufficient to excuse the procedural
25 default, therefore, *Martinez* . . . require[s] that Clabourne make two
26 showings. First, to establish “cause,” he must establish that his counsel in
27 the state postconviction proceeding was ineffective under the standards of
28 *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]. *Strickland*, in turn, requires
him to establish that both (a) post-conviction counsel's performance was
deficient, and (b) there was a reasonable probability that, absent the
deficient performance, the result of the post-conviction proceedings would
have been different. Second, to establish “prejudice,” he must establish that
his “underlying ineffective-assistance-of-trial-counsel claim is a substantial
one, which is to say that the prisoner must demonstrate that the claim has
some merit.”

1 *Clabourne*, 745 F.3d at 377 (citations omitted).

2 In *Davila v. Davis*, the Supreme Court declined to extend the rule announced in
3 *Martinez* to allow a federal court to hear substantial, but procedurally defaulted, claims of
4 ineffective assistance of appellate counsel when state postconviction counsel ineffectively
5 failed to raise that claim. *Davila v. Davis*, 137 S.Ct. 2058, 2065 (2017). Chavez-Juarez
6 argues that *Davila* was wrongly decided. (ECF No. 26 at 13–14.) Nonetheless, in light of
7 *Davila*, ineffective assistance of state postconviction counsel cannot provide cause to
8 excuse procedural default of a claim of ineffective assistance of appellate counsel.
9 Accordingly, ground four is dismissed as procedurally barred.

10 **IV. CONCLUSION**

11 It is therefore ordered that Respondents' motion to dismiss (ECF No. 19) is granted.
12 Grounds one, two, and four are dismissed.

13 It is further ordered that Respondents will have 60 days from the date this order is
14 entered within which to file an answer to the remaining ground in the petition.

15 It is further ordered that Petitioner will have 45 days following service of
16 Respondents' answer in which to file a reply.

17 It is further ordered that Petitioner's motion for extension of time to file an opposition
18 to the motion to dismiss (ECF No. 25) is granted *nunc pro tunc*.

19 DATED THIS 4th day of March 2020.

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22 MIRANDA M. DU
23 CHIEF UNITED STATES DISTRICT JUDGE
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